No. 20,641

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
Defendants-Appellants,

vs.

BETTY K. FURUMIZO,
Plaintiff-Appellee and Cross-Appellant.

ANSWERING BRIEF OF BAKER AIRCRAFT SALES, INC. TO OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA

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JURISDICTION

The jurisdiction of the District Court was based on Title 28, United States Code, Sections 1332, 1346(b) and 2671 *et seq.* The jurisdiction of this Court rests on Title 28, United States Code, Section 1291. Judgment was entered June 22, 1965 (R. 614), motions for new trial were timely filed (R. 628-633) and on October 1, 1965, an order was entered denying the motions for new trial (R. 693), notice of appeal was filed by the United States on November 26, 1965.

STATEMENT OF THE CASE

Appellant United States' statement of the case is accurate in so far as it goes; however, it omits practically all of the facts upon which its liability was based. A detailed recitation of the various statutes together with the regulations, bulletins and other evidence which led the Court below to the conclusion that the United States was negligent, appears in the opinion of the Court below beginning with numbered Finding 57 appearing in *Furumizo v. United States,* 245 F.Supp. 981 (1965) at page 998, through Finding 68, concluding at 245 F.Supp. page 1012.

At the time of the accident, Mr. Humphreys who was deceased at the time of trial, was actually handling the local control position under the supervision of the witness Garcia who testified at trial (Tr. 924). Garcia had read, and was aware of the material contained in Exhibit P-15 with reference to wake turbulence including the statement "severe vortex turbulence has a duration from 30 to 60 seconds, (1 to 3 miles) after the passage of a large airplane which caused it, and may persist much longer under favorable conditions". He was also aware of the statement in that Exhibit:

> "The roll effect of a trailing vortex from a large airplane, either propeller driven or jet, can exceed the aileron controllability of a small airplane flying parallel to it."

and of the statement:

> "The vertical gusts encountered when crossing laterally through the trailing vortices behind a large airplane can impose structural loads as high

as 10 G's on a small airplane flying at a high angle of attack." (Tr. 1123, 1124)

The Piper Cub had been held at its position on the runway approximately 1,000 feet from the intersection of runways 4 left and runway 8 on instructions from the tower. The plane could not move from that point until released by the tower (Tr. 1100). Garcia assumed when the plane was cleared that it was going to make its takeoff starting from that point (Tr. 1103, 1104). He was aware of the provisions of the Air Traffic Rules including that portion of Section 60.21 (Exhibit G-1) which states:

> "When an air traffic clearance has been obtained under either the VFR or IFR rules, the pilot in command of the aircraft *shall not deviate* from the provisions thereof unless an amended clearance is obtained." (Tr. 1106, 1107)

As a matter of fact, as is noted in Exhibit P-17:

> "A common understanding exists, by rule and by practice, that an air traffic control clearance is an 'authorization,' the provisions of which become binding *after* it has been accepted by the pilot."

With respect to clearances the Government had stated in its Flight Information Manual corrected as of the date of the accident (Exhibit G-6):

> "However such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if reasonable caution is exercised by the pilot."

Garcia testified that with respect to departing aircraft operating on the same runway, that no clearance would be issued unless the preceding aircraft had either crossed the opposite end of the runway or turned away from the path of the succeeding aircraft before the latter began its takeoff run (Tr. 1121). However, with respect to intersecting runways, he would issue a clearance as soon as the intersection had been cleared by the previous departing aircraft regardless of how close the other plane was to that intersection (Tr. 1122). He admitted that the provisions of Sections 422 and 423 of ATM-2-A (Exhibit G-5) were not applicable in the case of aircraft operating on intersecting runways (Tr. 112) and that therefore it was a situation where the controller was expected to use his best judgment under the provisions of Section 100.7 of ATM-2-A (Exhibit G-5), (Tr. 1122). Yet when asked, Question: "so that no matter where the aircraft is, you will clear him for takeoff, regardless of wake, regardless of traffic, regardless of whether he has got passengers on board, regardless of anything, you'd clear him?" Answer: "I would clear him." (Tr. 1150) Garcia had an override mike so that he could step in and take over air traffic control from trainee Humphreys, but on this occasion, although he was monitoring the transmissions, he saw no reason to do so (Tr. 1105).

Garcia understood the function of air traffic control to be "To expedite traffic in a safe, expeditious manner. To prevent any collisions of known aircraft." (Tr. 1108), and he understood that the term "col-

lision" as used in ATM-2-A included collisions between aircraft and vehicles on the ground and other obstructions (Tr. 1108-9). He admitted that there was no definition of a collision contained in Exhibit G-5. The attitude of the tower control personnel is rather forcefully illustrated by the testimony of Capellas, the ground controller who was in the tower at the time, whose position was that when he is working as local controller, he would clear an airplane for takeoff even if it was sitting on the end of the runway facing the end, with only ten feet of runway left (Tr. 250).

It is also of significance to note that at Honolulu International Airport, at the time of the accident, the procedures for designating intersection takeoff points had not been inaugurated (Tr. 241, 242) but as is obvious from the transmissions in this case (Exhibit P-5), intersection takeoffs were being authorized by the tower. Both Capellas (Tr. 234) and Garcia (Tr. 1077) saw the Piper Cub commence its takeoff roll. They both knew that the Cub had in fact not delayed its takeoff after receiving the clearance, but had gone forward. They took no further action with respect to the Cub. Garcia believed that wake turbulence would persist from 5 to 7 minutes (Tr. 999).

Professor Lissaman testified that the intersecting runway wake turbulence situation was particularly dangerous because of the fact that both vortices had to be crossed, and that in such a situation the plane should either remain on the ground until the vortices had passed over head, or else should fly above the flight level of the departing aircraft (Tr. 494). He

further testified that it was possible to calculate tables of separation times which would be safe and pointed to the Bleviss report and the tables contained therein (Tr. 393, Exhibit P-38). In his opinion, in the particular situation, it was not possible for the pilot to have recovered from the effect of turbulence and the pilot would not have been able to maintain control of the aircraft (Tr. 441, 488).

Mr. Carmody, an expert for the FAA, took the position that under the then current regulations, so long as the Cub was at least 100 feet back from the intersection, he could be cleared as soon as the other plane crossed the intersecting runway (Tr. 1366), and that in fact control tower operators were encouraged by the Government to issue the clearance just as soon as possible (Tr. 1367).

INTRODUCTION

The United States in this case, urges two claimed errors on this Court:

1. That the Court below erred in not finding the chain of causation broken by the alleged negligence of Shima, the instructor pilot employed by defendant-appellant Baker Aircraft Sales, Inc., and

2. That the Court below erred in finding that the control tower operators were negligent in clearing the aircraft in question.

Section 60.2 of the Air Traffic Rules provides in part:

> "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft."

Throughout the brief of the United States there seems to run an assumption that because of this rule, the pilot of any aircraft which crashes is automatically liable as a matter of law and the control tower operators are excused from any responsibility whatsoever. This is not the law.

The law in Hawaii is that a chain of causation between a negligent act and the damages is not broken by an intervening negligent act which is foreseeable by the first actor. This is the situation here (assuming that there was negligence on the part of Baker Aircraft Sales, Inc. or its instructor Shima).

As to the question of whether or not the control tower operators acted negligently, in this case, we have a situation where there were in fact no adequate separation standards with respect to aircraft departing on intersecting runways; where the position of the United States was that as long as the departing aircraft had passed through the intersection, then an aircraft on the intersecting runway could be cleared at any time; and where the United States was actually encouraging control tower operators to issue clearances at the earliest possible moment; where in point of fact, the aircraft in question was placed and held on the runway in the position from which it started its takeoff roll, by the control tower operators; and where in fact it could not help but encounter turbulence

which would be beyond controlling; where the control tower operators knew that the airplane would probably commence its roll from that point; where they had no reason to assume that there would be a delay in its commencing its takeoff roll; where they actually observed it commence the takeoff roll and did nothing further; and where the form of words used, when construed together with the other publications of the Government, seemed to give an assurance that it was safe to take off so long as caution was used in flying the airplance. In such a situation, clearly the control tower operators were negligent in carrying out the duty which the statute placed upon them to provide for the safety of air traffic.

ARGUMENT

I. DEFENDANT BAKER AIRCRAFT SALES IS NOT LIABLE AS A MATTER OF LAW SIMPLY BECAUSE SHIMA WAS INSTRUCTOR PILOT IN CHARGE OF THE AIRCRAFT.

Throughout the argument in defendant-appellant United States' brief on the question of causation, there runs the unspoken, but very obvious assumption that because Shima was the pilot in charge of the aircraft, Baker Aircraft Sales, Inc. is automatically liable for any damages resulting from a crash to the aircraft, and the United States is insulated from any negligence which may have contributed to the crash on the part of its employees. This simply is not correct as a matter of law. It is true that the Air Traffic Rules, Section 60.2 provides:

> "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft." (Exhibit G-1)

This however obviously does not place liability as a matter of law upon the pilot or his employer. The matter of whether or not the pilot and the employer are guilty of negligence and whether or not they are liable is a matter to be established through evidence. We have argued the evidence on the subject in defendant-appellant Baker Aircraft Sales, Inc.'s opening brief and see no need to repeat that here.

This Court has made it perfectly plain that the pilot in charge is not in all instances and in all events liable for the crash, for as this Court has said:

> "The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed."
>
> *United States v. Miller,* 303 F.2d 703 (CA 9, 1962 at page 711), cert. denied 371 U.S. 955.

If the real but unspoken premise upon which the United States' argument is based were true, then the numerous cases dealing with the question of whether or not there is evidence as to who was flying the airplane in question, would be simple *tour de force* since there is always a responsible pilot in charge of any aircraft flight. Compare Annotation 36 A.L.R.2d 1290.

II. ASSUMING ARGUENDO THAT THERE WAS NEGLIGENCE ON THE PART OF THE INSTRUCTOR PILOT SHIMA, THAT DID NOT BREAK THE CHAIN OF CAUSATION.

As is pointed out in the Hawaiian case of *Mitchell v. Branch and Hardy,* 45 Hawaii 128 (1961), quoting from 50 Har. L. Rev., pp. 1125, 1129:

> "The earlier of the two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff's injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant was itself foreseeable." 45 Hawaii at 136-137.

Here, under the evidence the tower placed and held the aircraft which crashed on the runway at a point approximately 1,000 feet short of the intersection and pointing toward the intersection. Under the evidence, the plane was not at liberty to move from that position because the tower had instructed it to hold that position. The tower then issued the clearance which read:

> "Piper 99 Zulu, caution turbulence departing DC-8 cleared for takeoff."
>
> (Exhibit P-5, Transmission 44)

We submit that this language foreseeably could be construed by a pilot to mean that it is safe to take off so long as caution is used with respect to the tur-

bulence which may be encountered. Exhibit G-6 issued by the Government states:

> "However such clearances will not be issued unless, in the opinion of the tower, the anticipated action can be safely completed from a collision hazard standpoint if reasonable caution is exercised by the pilot."

By regulation it is provided:

> "When an air traffic clearance has been obtained under either the VFR or IFR rules, the pilot in command of the aircraft shall not deviate from the provisions thereof unless an amended clearance is obtained." (Exhibit G-1, Section 60.21)

Thus the United States had recognized that:

> "A common understanding exists, by rule and by practice, that an air traffic control clearance is an 'authorization', the provisions of which become binding *after* it has been accepted by the pilot." (Exhibit P-17, page 3)

The witness Carter, an expert pilot, testified that the language appearing in Exhibit G-6 was such that it led pilots to believe that they were under directions to do what the tower told them (Tr. 897). Garcia assumed at the time that unless he was advised of some different intention, the pilot of the Cub was going to make his takeoff run starting from the point at which he was cleared (Tr. 1103). Both he and Capellas actually saw the Cub begin its starting roll but neither did anything to stop it. Yet it is obvious from the various Governmental publications in evidence including Exhibit P-15 with which he admitted familiarity,

and from the testimony of Professor Lissaman that there was great danger to the aircraft in beginning its takeoff roll at that time and place.

Certainly if it is held that there was negligence on the part of the pilot in the aircraft in taking off because of the then current knowledge with respect to the effects of wake turbulence, then it was equally negligent to issue a clearance because of the same knowledge on the part of the control tower operators, it having been stipulated that:

> "13. The existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft was a matter of 'common knowledge' in the flying industry and specifically to the employees of the defendant U.S.A. and more particularly those in the FAA at the time of the accident." (R. 371-380)

And certainly, it was reasonably to be foreseen that a pilot might attempt to take off immediately upon receiving the clearance since the obvious object of the clearance is to give an authorization to takeoff. This was particularly true in view of the wording of the clearance here which seemed to imply that it was safe to take off so long as caution was used when in fact it was completely unsafe to take off. Moreover, the control tower operators actually observed the beginning of the takeoff roll and did nothing to prevent it. In these circumstances it is obvious that the chain of causation was not broken by the alleged subsequent negligence on the part of Baker Aircraft Sales Inc.'s employee Shima.

III. THE FACT THAT THE CONTROL TOWER OPERATORS WERE EMPLOYEES OF THE UNITED STATES DOES NOT EXCUSE THEIR NEGLIGENCE.

On the question of whether or not the United States may be held liable for the actions of the control tower operators, if they are negligent, the law seems to be clear. This Court stated in *United States v. Miller,* 303 F.2d 703 (CA 9, 1962; cert. denied 371 U.S. 955:

> "The optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel. In any given case, one, both, or neither could be guilty of a breach of the duties imposed.
>
> "This view is implicit in the decision of the court in Eastern Air Lines v. Union Trust Co., 95 U.S.App. D.C. 189, 221 F.2d 62, affirmed, sub nom., United States v. Union Trust Co., 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796. The ultimate result reached in that case recognized that both the Government and the airline had concurrently breached their duties, and each was held liable." (303 F.2d 703 at 711)

In *Eastern Air Lines v. Union Trust Company,* 221 F.2d 62 (CA D.C. 1955) the court stated:

> "It is therefore our opinion that, if a Government towerman negligently clears two planes to land on the same runway at the same time, *or is guilty of some other negligent act or omission in doing his work the Government is liable for resulting injury in the same manner and for the same reason that it is liable for injury done by the driver of a mail truck* who, in exercising discretion as to how to drive, negligently runs

through a red traffic light." (221 F.2d 62 at page 78) (Italics supplied.)

In *United States v. Schultetus,* 277 F.2d 322 (CA 5, 1960) in holding for the Government the Court said:

"We do not say that cases may not arise where the United States will be liable by reason of negligence of control tower operators for damages arising from the collision of aircraft. We are convinced that this is not such a case." (277 F.2d 322 at 328)

In *Wenninger v. United States,* 234 F.Supp. 499 (D.C. Del. 1964) the contention was that the Federal Government was liable in not issuing a warning that heavy air transports were using a certain VOR approach. The decedent had flown his airplane into the wake turbulence created by one of the Air Force transports. The plane disintegrated and he was killed. The court held that there was negligence in failing to issue a warning but held that there was no evidence to show that issuing the warning would have caused the decedent to desist from making the flight and hence held that there was no causal connection between the failure to issue the warning and the accident. The case therefore stands for the principle that the United States can be held liable for the actions of its agents in connection with issuing warnings or giving clearances with respect to turbulence created by large aircraft.

The United States has cited the case of *New York Airways, Inc. v. United States,* 283 F.2d 496 (CA 2d,

1960) but that is not a case which holds that the Government could not be liable, it is simply a case which holds that the pilot employed by the plaintiff was contributorily negligent.

United States also cites the case *Hartz v. United States,* 249 F.Supp. 119 (D.C.Ga. 1965). In that case, a plane was cleared for takeoff from an intersection and crashed due to turbulence encountered from a preceding aircraft. We do not read the case as holding that the Government cannot be liable, but rather as holding that there was a failure to prove the allegations of the complaint.

A significant difference between the facts in the *Hartz* case and the facts in the instant case is that in that case both airplanes took off from the same runway, thus, there were prescribed separation standards in the ATM-2-A manual (Exhibit G-5). In our case the takeoff was from intersecting runways and as the Court found, and Garcia admitted, there were no separation standards prescribed in the manual and therefore the matter was one left to the discretion of the controllers. Moreover, in the *Hartz* case, as the Court noted:

> "Although plaintiffs' main claim of negligence has been the failure to maintain adequate separation, it should be remembered that Hartz' request for an intersection takeoff contributed to a substantial shortening of the runway distance between himself and the preceding aircraft. Thus, instead of 7,860 feet, which would have been available, there was but 5,700 feet, but Hartz elected to take the intersection takeoff." (249 F. Supp. at 126)

In the instant case, as the facts clearly demonstrate, the Piper Cub in question was, by orders from the tower, put down on the runway and held in the position from which it commenced its takeoff roll until cleared. Thus, it is apparent that in so far as the *Hartz* case can be said to be authority contrary to the decision reached by the Court below in the instant case, it is on the facts distinguishable.

The applicable statutes with respect to the purpose of air space control were the same in 1961 at the time of the accident as in 1958 when the Federal Aviation Act of 1958 was passed, 49 United States Code, Section 1348. The pertinent regulations (Exhibit G-1) also remained unchanged. The circular letter issued by the Government on February 17, 1955 (Exhibit P-24), states in part:

> "In addition, the survey emphasized that control personnel must be constantly alert to detect situations which, if not promptly recognized and acted upon, could lead to the development of hazardous situations and possible destruction to life and property. . . . Under conditions of the type referred to above, and in any other condition where it is anticipated that turbulence could exist, *it is preferable that aircraft be delayed until it can be reasonably assumed that a hazardous situation no longer exists.* Lack of radio communication should not preclude the issuance of warning information to pilots since adequate light signal procedures exist for this purpose. Failure to recognize these potential hazards and to act accordingly can reflect on the judgment and efficiency of our facilities and defeats the

purpose for which air traffic control services are established." (Italics supplied.)

In December of 1955, in Aviation Safety Release No. 399 (Exhibit P-15) the Government described wing-tip vortices as "the greatest potential hazard, except actual collisions, to small aircraft flown in the vicinity of large airplanes." In 1956, the United States stated that it was still necessary for controllers to be constantly on the alert to detect situations which could develop into hazardous conditions with respect to wake turbulence (Exhibit G-14). On October 27, 1958, by circular letter (Exhibit P-26), the United States stated:

> "Control personnel should continue to be alert to the possible hazards from thrust stream turbulence which may be anticipated, and to aid pilots through issuance of warning information *coupled with lengthened separation wherever thought advisable.*" (Italics supplied.)

Then, on December 29, 1959, by Exhibit G-15, the United States, without any change in the regulations, reversed its position and in effect told control tower operators that the separation standards contained in ATM-2-A were sufficient and that all they need do in the future was to issue a cautionary warning with the clearance.

This becomes especially significant when considered with the testimony of Garcia and Capellas that in their view they had no authority to withhold a clearance for takeoff and they would issue one to anyone, anywhere, anytime, regardless of the hazard involved

as long as it did not involve a hazard of actual collision with another aircraft (Tr. 250, 1105). Also significant in this area is the testimony of Carmody to the effect that where there are intersecting runways, a plane can be cleared even if it is only one hundred feet from the intersection facing toward it as soon as the plane on the other runway has cleared the intersection (Tr. 1366), and the testimony that the Government encouraged control tower operators to clear planes for takeoff at the earliest possible moment (Tr. 1367). As the Court below pointed out in its decision, the provisions for the designation of intersection takeoff points, had not been put into effect at Honolulu International Airport at the time of the accident in question, see Exhibit P-18, yet an intersection takeoff was cleared in the particular instance in the face of the provisions of Section 431.4 of the Air Traffic Control Procedures (Exhibit P-16-A) stating:

> "Take-off clearance should normally be issued after the aircraft has taxied to the end of the runway-in-use or the run-up area adjacent thereto."

There was nothing which prevented the Government from issuing adequate separation standards based on the technical knowledge in 1961, since as Professor Lissaman noted (Tr. 493) such standards had already been promulgated in the exhibits to the Bleviss Report (Exhibit P-38).

With respect to the authority of the control tower operators, the Government reversed its position in the

ATS Bulletin of November 15, 1962 (Exhibit P-39), and stated:

> "You can avoid clearing a light plane for immediate takeoff behind a large aircraft, even though it will mean delaying traffic slightly."

As the Court below noted this again was done without any change in the existing laws and published regulations, and it is therefore obvious that despite the denial of the fact by the witnesses for the United States, the control tower operators did have the authority to delay takeoff clearances until the turbulence should have subsided.

Obviously, the intersecting runway situation was more dangerous than the situation where the two aircraft were taking off from the same runway since in the intersecting runway situation, it would be necessary to cross both vortices at some time (Tr. 494). Yet it is precisely that situation for which no minima were prescribed as to the separation of aircraft and for which the Government's expert took the flat position that so long as the aircraft were clear of the intersecting runway by one hundred feet, it could be cleared as soon as the other plane had cleared the runway (Tr. 1366).

By the very regulations of the Government itself, it is obvious that the control tower operators, at all times, had the authority to delay takeoff clearances until turbulence had subsided. It is equally obvious that it was possible to promulgate adequate separation standards for intersecting runway situations and for turbulent situations.

Instead, having earlier advised the control tower operators to delay giving clearances, the Government had, at the time of the accident, reversed its position, stated that the existing separation minima (which did not apply to intersecting runways) were adequate, and that it was only necessary to issue warning information, and the Government had in fact put itself in the position of urging control tower operators to issue clearances at the earliest possible moment.

In the particular situation, if it can be said that Shima was negligent in taking off or allowing Furumizo to take off, it certainly can be said that the control tower operators were negligent in issuing the clearance. In fact, the clearance issued as worded, was almost an entrapment since it indicated that the takeoff would be safe if caution were exercised (see Exhibits P-5 and G-6).

The control tower operators put the aircraft in the position in which it was, held it there and cleared it from that point, realizing that the takeoff run roll would be started from that point. They saw the takeoff roll begin, they knew or should have known that it was an extremely dangerous takeoff, and they did nothing. In these circumstances, the Government of the United States is liable.

CONCLUSION

For the reasons stated above it is respectfully submitted that the judgment below as to the United States of America should be affirmed.

Dated, Honolulu, Hawaii,
July 1, 1966.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK D. PADGETT